BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF KATHY K. BLAKE

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2003-326-C

MARCH 12, 2004

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes, I filed direct testimony and four exhibits on January 29, 2004.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. My rebuttal testimony addresses numerous comments contained in the direct testimony filed by other witnesses in this proceeding on January 29, 2004. Specifically, I address portions of the testimony of Mr. Joseph Gillan representing CompSouth, Dr. Mark T. Bryant, Mr. James Webber, and Ms. Sherry Lichtenberg representing MCI WorldCom Communications, Inc. and MCIMetro Access

Transmission Services, LLC ("MCI") and Mr. Steven E. Turner and Mr. Mark D. Van de Water representing AT&T Communications of the Southern States, LLC ("AT&T").

Q. ALL PARTIES HAVE DIRECTED THIS COMMISSION TO VARIOUS PORTIONS OF THE TRIENNIAL REVIEW ORDER ("*TRO*") AND THE RULES IN SUPPORT OF THEIR POSITIONS IN THEIR DIRECT TESTIMONY. WHAT IS THE IMPACT OF THE D.C. CIRCUIT COURT OF APPEALS ORDER ON THE TRO IN THIS PROCEEDING?

A. Currently the impact of the D.C. Circuit Court's opinion is unclear. At the time of filing this testimony, the D.C. Court had vacated large portions of the rules promulgated as a result of the *TRO*, but stayed the effective date of the opinion for at least sixty days. Therefore my understanding is that the *TRO* remains intact for now, but its content, and the rules adopted thereto, must be suspect in light of the court's harsh condemnation of large portions of the order. Accordingly, I will reserve judgment, and the right to supplement my testimony as circumstances dictate, with regard to the ultimate impact of the D.C. Court's order on this case.

THE ROLE OF THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Q. AT PAGES 7-8 OF HIS TESTIMONY, MR. GILLAN IMPLIES THAT THE SOUTH CAROLINA CODE (SECTIONS 58-9-280, 58-9-576 AND 58-9-577) REQUIRES THAT BELLSOUTH UNBUNDLE EVERY PART OF ITS LOCAL

NETWORK, REGARDLESS OF THE REQUIREMENTS OF THE TELECOMMUNICATIONS ACT OF 1996 (THE "ACT"). HE STATES THAT THE ONLY REASON HE IS NOT RECOMMENDING THAT THE COMMISSION "INDEPENDENTLY ORDER THE ILECS TO OFFER UNBUNDLED LOCAL SWITCHING UNDER STATE LAW" IS BECAUSE "SUCH ACTION IS UNNECESSARY" DUE TO THE FEDERAL COMMUNICATIONS COMMISSION'S (FCC's) NATIONAL FINDING ON MASS MARKET SWITCHING. PLEASE RESPOND.

A. I am not a lawyer, and I will rely on BellSouth's attorneys to address the legal aspects of Mr. Gillan's testimony as appropriate. However, I would like to address this portion of Mr. Gillan's testimony from a policy perspective.

First, Mr. Gillan suggests at page 7, lines 6-8, that sections 58-9-280, 58-9-576, and 58-9-577 were passed into law "nearly a year before the federal Act was enacted." That is not the case. The federal Act was enacted on February 6, 1996. Each of the three state statutes that Mr. Gillan mentions were passed into law nearly four months later – on May 29, 1996. And, as Mr. Gillan notes on page 7 of his testimony, Section 58-9-280 clearly states that any unbundling requirements under this statute "shall be consistent with federal law . . . ."

Similarly, Section 251(d)(2) of the federal Act puts limits on a state's ability to make determinations about unbundling that are inconsistent with those made by

the FCC. Mr. Gillan's testimony is flatly contrary to the FCC's discussion of state authority in the *Triennial Review Order ("TRO"):*[1]

> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation…If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules. (*TRO* ¶¶ 194-195).

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, et al., *Report and Order and Order on Remand an Further Notice of Proposed Rulemaking*, FCC 03-36, released August 21, 2003.

There is no question that the FCC's framework for finding market-by-market non-impairment for mass-market switching is an integral part of the federal regime and any state decision regarding the local circuit switching impairment issue must be consistent with that federal regime. Despite Mr. Gillan's arguments, the plain language of the *TRO* shows the error in his approach.

Q. AT PAGE 15, IN DISCUSSING THE TASKS ASSIGNED TO STATE COMMISSIONS BY THE FCC, MR. GILLAN SUGGESTS THAT THIS COMMISSION'S ROLE IS TO SIMPLY "CONFIRM THERE ARE NO EXCEPTIONS TO" THE FCC'S NATIONAL FINDING OF IMPAIRMENT WITH RESPECT TO MASS MARKET SWITCHING. PLEASE COMMENT.

A. Mr. Gillan's suggestion is misguided. While the FCC did make a national finding that competitive local providers ("CLECs") are impaired without access to mass market switching on an unbundled basis, the FCC did not simply ask the states to confirm that there are no exceptions. To the contrary, in footnote 1404 of the Triennial Review Order (*"TRO"),*[2] the FCC specifically stated that their intent was to "make a national finding based on a more granular inquiry". In the *TRO*, the FCC determined that this granular inquiry would be most appropriately conducted by the state commissions. Further, in paragraph 461 of the *TRO*, the FCC stated,

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket No. 01-338, et al., *Report and Order and Order on Remand an Further Notice of Proposed Rulemaking*, FCC 03-36, released August 21, 2003.

> We also recognize that a more granular analysis may reveal that a particular market is not subject to impairment in the absence of unbundled local circuit switching. We therefore set forth two triggers that state commissions ***must*** apply in determining whether requesting carriers are impaired in a given market. Our triggers are based on our conclusion that actual deployment is the best indicator of whether there is impairment, and accordingly evidence of actual deployment is given substantial weight in our impairment analysis. (Emphasis added.)

The FCC's intent that the states conduct a granular analysis of markets within the state is a far cry from Mr. Gillan's interpretation, which is much akin to simply "seconding a motion from the chair".

Q. AT PAGE 71, MR. GILLAN RECOMMENDS THE COMMISSION OPEN YET ANOTHER PROCEEDING TO ESTABLISH A MARKET RATE FOR NETWORK ELEMENTS NO LONGER SUBJECT TO SECTION 251 PRICING STANDARDS. IS THIS APPROPRIATE?

A. No. Mr. Gillan's recommendation misses the mark. When an ILEC has been relieved of its obligation to offer a network element under Section 251 of the Act, such as local circuit switching, it means that CLECs are no longer impaired without access to that network element. Under a finding of no impairment, there are sufficient alternatives in the market such that CLECs do not need to rely on ILEC services at regulated prices. Because CLECs have alternatives, competition

will drive the market price of the network element. As such, it is appropriate for BellSouth to set its rate according to those market conditions through negotiations with the CLEC. It is neither necessary nor appropriate for this market rate to be set by this Commission, and it has no authority to do so. Mr. Gillan's suggestion should therefore be rejected.

Q. MR. GILLAN RECOMMENDS A TWO-YEAR QUIET PERIOD FOLLOWING THIS PROCEEDING, IN WHICH THE ILECS MAY NOT SEEK FURTHER UNBUNDLING RELIEF (PAGE 72). IS THIS APPROPRIATE?

A. Absolutely not. Under the guise of "provid[ing] needed certainty to the industry", Mr. Gillan is merely attempting another strategy designed to extend the unbundled network element platform ("UNE-P") as long as possible. Although it may be appropriate to set some basic guidelines for subsequent proceedings, it should be for the purpose of acknowledging and furthering competition rather than in protecting UNE-P. Two years in this business is a very long time and much can happen. Delaying an ILEC's ability to obtain further relief from its unbundling obligations due to an arbitrary "quiet period" is unfair to the ILEC and does not recognize the dynamics of the marketplace.

Further, with respect to those markets where CLECs continue to be impaired without access to unbundled switching, Dr. Bryant states, "If CLECs are not impaired without access to UNE switching, I would expect more CLECs to self-provision switching in the relatively near future." (Bryant, p. 20-21) Dr.

Bryant's statement will not always be right for the simple reason that TELRIC priced switching by the incumbent will often keep CLECs from deploying their own switches, even where the CLEC would not be impaired without unbundled switching. However, in some cases CLECs will deploy their own switches in the future. When that activity occurs or other evidence of no impairment surfaces, BellSouth should have the option to immediately petition for relief in that market.

COMPETITION AND UNE-P

Q. MR. GILLAN DISCUSSES WHAT HE CALLS THE "COMPETITIVE PROFILE" IN SOUTH CAROLINA (PAGES 29-34) CONCLUDING THAT UNE-P PRODUCES STATEWIDE COMPETITION. FROM HIS ASSESSMENT, MR. GILLAN STATES THAT THE COMMISSION "SHOULD NOT RESTRICT THE AVAILABILITY OF UNBUNDLED LOCAL SWITCHING AND UNE-P UNLESS IT CAN CONCLUDE THAT AN ALTERNATIVE WILL PRODUCE A SIMILAR COMPETITIVE PROFILE." DO YOU AGREE?

A. No, I do not. First, Mr. Gillan appears to suggest that the entire state of South Carolina should be the market area, because he says the UNE-P produces statewide competition and any alternative should do the same. As the FCC was specific in pointing out, "State commissions have discretion to determine the

contours of each market, but they may not define the market as encompassing the entire state." (*TRO* ¶ 495).

Second, there is no reference in the *TRO* that places a requirement upon this Commission to ensure that a statewide alternative to UNE-P is in place before the Commission can find no impairment in a particular market. Indeed, such a requirement would make no sense given the fact UNE-P itself will remain in place in those markets where relief is not granted.

However, there most definitely is a requirement that this Commission determine that CLECs are not impaired in a market when either the self-provisioning or wholesale triggers are met or the market is found to be conducive to competitive entry. This analysis is done on a market-by-market basis, as BellSouth has done in establishing the 16 distinct geographic markets in its territory in South Carolina.

Finally, it is not surprising at all that UNE-P produces some level of competition in most wire centers in the state of South Carolina. After all, UNE-P is nothing more than the incumbent LEC's local service offering at below-cost prices. BellSouth will only receive switching relief where competitive alternatives exist or could exist. Thus, competition will continue after BellSouth gets switching relief. The difference will be that the competition that flourishes after relief is granted will be healthy facility-based competition rather than pseudo resale competition.

Q. TWO PARTIES ALLEGE THAT COMPETITION IN SOUTH CAROLINA DEPENDS ON THE AVAILABILITY OF THE UNBUNDLED NETWORK ELEMENT PLATFORM OR UNE-P. DO YOU AGREE?

A. No. There seems to be a theme that runs through the testimony of witnesses Gillan (pp. 61-62) and Bryant (pp. 13-15), which is based on the mistaken notion that CLECs cannot compete in South Carolina without UNE-P.

These witnesses are incorrect. First, the *TRO* requires that either a provisioning trigger be met or potential competition be shown before a state commission can find that no impairment exists for local switching. Second, the Act envisioned provisioning of local exchange competition by three means; resale of the incumbent's retail services, purchase of unbundled network elements ("UNEs"), and interconnection via a CLEC's own facilities. All three options, or combination of options, are available to CLECs. CLECs are certainly not limited to UNE-P as an entry method.

In the markets where the state commission finds CLECs are not impaired without unbundled switching, the CLEC has the means to supply its own switching or can use BellSouth's local circuit switching at market prices. BellSouth must continue to provide local switching to CLECs under Section 271(c)(2)(B) of the Act. Therefore, and as I discussed above, BellSouth will offer local switching at a competitive market rate in those markets where the Commission determines that CLECs are not impaired. In addition, there will be a transitional period sufficient to allow CLECs to implement their chosen options (e.g., *TRO* ¶ 532 describes

how, even after a finding of no-impairment in a particular market, UNE-P will not be phased out for a subsequent 27 months). Therefore, contrary to Dr. Bryant's statement, all consumers currently served by UNE-P CLECs will not be forced to make a change in their telephone service. Indeed, any switching relief provided to BellSouth should be transparent to the end user consumer.

Finally, although at this time BellSouth has not attempted to demonstrate the presence of wholesale switch providers in this case, it is reasonable to expect that in markets where no impairment is found, wholesale switching will become more prevalent as an option for CLECs. Once the subsidized switching that BellSouth is currently required to offer is eliminated and BellSouth provides switching at market-based rates, switch providers will likely find that wholesale switching offers a viable and long-term market where they can compete effectively.

In summary, the parties that attempt to minimize CLEC opportunity in the absence of unbundled local switching are doing so only to preserve the below-cost prices they currently pay for the UNE-P. They give little credence to the options available to them including the multiple sources of switching, and BellSouth's local switching at market rates.

Q. ON PAGES 63-65 MR. GILLAN SUGGESTS THAT UNE-P ENCOURAGES INVESTMENT. DO YOU AGREE?

A. Absolutely not. The use of UNE-P, if anything, discourages investment in facilities for both CLECs and ILECs. UNE-P is basically the resale of an ILEC's

services. While Mr. Gillan claims that CLECs invest in "billing systems, computer systems, offices and, perhaps most importantly, human capital", such investment is minimal compared to the investment associated with true facilities-based competition. Furthermore, the investment claimed by Mr. Gillan can be easily terminated if business plans change. The FCC has recognized that a CLEC who invests in facilities, i.e. collocation space, transport facilities, etc., has made a commitment to provide service in a particular market by investing in network infrastructure. In its *Pricing Flexibility Order,*[3] in discussing the necessary competitive showing test for common line and traffic-sensitive services, the FCC states,

> resold services employ only incumbent LEC facilities and thus do not indicate irreversible investment by competitors whatsoever. Similarly, a competitor providing service solely over unbundled network elements leased from the incumbent (the so-called "UNE-platform") has little, if any, sunk investment in facilities used to compete with the incumbent LEC.

(*Pricing Flexibility Order* ¶ 111)

[3] *In the Matter of Access Charge Reform (*CC Docket No. 96-262*), Price Cap Performance Review for Local Exchange Carriers* (CC Docket No. 94-1), *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers* (CCB/CPD File No. 98-63), *and Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA* (CC Docket No. 98-157), Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, Rel. August 27, 1999.

Thus, the lack of sunk investment affords a CLEC greater opportunity to exit a market rather than a commitment to provide service to its customers.

Mr. Gillan also suggests that UNE-P provides the capability for data LECs to continue to have access to end users. His argument for encouraging investment with this example is not clear. He states that with the elimination of the line sharing requirement, a data LEC will be required to either purchase the entire loop to provide service to its customer or to enter into a line splitting arrangement with a "voice partner". (Gillan, p. 64) Neither of these situations encourages investment. In both situations, the data LEC is still purchasing a stand-alone UNE loop that uses BellSouth's existing network facilities. In markets where there is no switching impairment, the only change is that switching is no longer available at TELRIC-based rates and the data LEC or its "voice partner" purchases an unbundled network element-loop ("UNE-L"). There is no new investment by a data LEC.

Q. IS MR. GILLAN CONSISTENT WITH HIS ARGUMENTS ABOUT UNE-P ENCOURAGING INVESTMENT?

A. No. Mr. Gillan's testimony appears to be inconsistent with his claim that UNE-P encourages investment. On page 64, Mr. Gillan states "The POTS market is shrinking as customers choose (for themselves, and not under regulatory direction) to move to more advanced services. There is no valid policy reason to encourage additional investment in the generic local exchange facilities that

underlie UNE-P." By Mr. Gillan's own admission, UNE-P has not encouraged investment, at least in the POTS market.

Furthermore, contrary to Mr. Gillan's position, UNE-P does nothing to advance the development of new technologies. It is not UNE-P providers who introduce new technologies, but rather that carriers with control over their own switch that decide what software and hardware to install in order to customize their various offerings. This is demonstrated by the testimony of Jake E. Jennings of NewSouth, filed in the loop transport proceedings currently taking place in BellSouth's region:

> NewSouth [a facilities-based carrier with voice and data switches in Florida] is able to attract customers because, through the facilities it has deployed, it can offer customers a value proposition that exceeds what they currently receive from the incumbent. This value proposition involves not only better prices, but also more and varied services, including advanced services.[4]

In such cases, CLECs may find new technologies that offer services ILECs are not offering. Such enhancements to their switches will drive competition and innovation among competitors and will lead to a market driven by new offerings based on new technologies. That is not the case with UNE-P.

[4] Florida Docket No. 030852, TRO Loop/Transport, Revised Direct Testimony of Jake E. Jennings, p. 9, lines 14-18; Georgia Docket No. 17741-U, filed January 30, 2004, p. 10, lines 15-19, North Carolina Docket No. P-100, Sub 133s, filed February 11, 2004, p. 10, lines 18-22; and Tennessee Docket No. 03-00527, filed March 1, 2004, p. 10, lines 17-21.

GEOGRAPHICAL MARKET DEFINITION

Q. PLEASE DISCUSS MCI'S DEFINITION REGARDING THE APPROPRIATE GEOGRAPHIC MARKETS FOR MASS MARKET SWITCHING.

A. The problems with the market definition proposed by MCI are discussed further in the rebuttal testimony of Dr. Pleatsikas. Let me note, however, that what at first blush appears to be a definition of geographic markets is, in reality, a design by MCI to secure the continuation of UNE-P indefinitely. MCI recommends that markets be defined as wire centers. (Bryant, pp. 44-49) Under this approach, MCI simply hopes to limit the loss of UNE-P to the greatest extent possible. MCI expects that BellSouth may be relieved of its UNE switching obligation in some wire centers, but hopes to confine the "damage to UNE-P" to relatively small pockets. MCI's approach to defining the geographic market is consistent with its strategy to limit the amount of switching relief granted to BellSouth so MCI can continue using UNE-P to the maximum extent possible. However, MCI's approach is not consistent with the *TRO*.

Q. PLEASE FURTHER ADDRESS MCI'S CHOICE OF THE WIRE CENTER AS THE CORRECT DEFINITION OF GEOGRAPHIC MARKET IN THIS PROCEEDING.

A. MCI's position is inconsistent with testimony filed by its own witnesses in previous proceedings. Here, Dr. Bryant touts the wire center as the appropriate

market definition, stating at pages 29-30, "ILEC wire center boundaries are the most natural geographic boundaries for purposes of defining markets for several reasons." In contrast, in testimony filed in previous arbitration cases, MCI discounts the geographic area of an ILEC's wire center when compared to the more updated CLEC networks. Specifically, in Georgia Docket No. 11901-U, Mr. Ron Martinez compared BellSouth's network to MCI's network:

> ILEC networks, developed over many decades, employ an architecture characterized by a large number of switches within a hierarchical system, with relatively short copper based subscriber loops. By contrast, WorldCom's local network employs state-of-the-art equipment and design principles based on the technology available today, particularly optical fiber rings utilizing SONET transmission. In general, using this transmission based architecture, it is possible for *WorldCom to access a much larger geographic area from a single switch* than does the ILEC switch in the traditional copper based architecture. This is why, in any given service territory, WorldCom has deployed fewer switches than the ILEC. *Any CLEC will begin serving a metropolitan area with a single switch and grow to multiple switches as its customer base grows*.
>
> In general, at least for now, WorldCom's switches serve rate centers at least equal in size to the serving area of the ILEC tandem. WorldCom is able to serve such large geographic areas

via fiber network and bears the cost of transport of that owned network. (Emphasis added.) (Direct Testimony, pp. 35-36)

MCI's own testimony establishes that a geographic market as defined by the boundaries of a decades old ILEC wire center is meaningless because MCI reaches well beyond the wire center to serve its market. By its own admission MCI does not use the wire center to identify the customers it targets. Rather, it uses a number of other factors and appears to be limited in its market reach only as a function of its fiber network.

Q. WHAT GUIDANCE DID THE FCC PROVIDE IN DETERMINING GEOGRAPHIC MARKETS?

A. Paragraph 495 of the *TRO* gives guidance to state commissions in designing geographic markets. State commissions must consider locations of customers actually being served, variation in factors affecting the competitors' ability to serve groups of customers, and the ability to target and serve specific markets economically and efficiently using currently available technology. However, the FCC was also specific in pointing out:

> While a more granular analysis is generally preferable, states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-

> party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commission must use the same market definitions for all of its analysis. (Footnotes omitted)

The fact that the FCC was concerned that the geographic area not be defined as the entire state indicates its belief that market areas would be something substantially larger than the ILECs' wire centers. BellSouth's proposal to use the individual UNE rate zones adopted by this Commission, subdivided into smaller areas using the Component Economic Areas ("CEAs") as developed by the Bureau of Economic Analysis of the United States Department of Commerce represents a more appropriate definition of geographic markets. UNE rate zones are an appropriate starting point for the market definition because, by design, they reflect the locations of customers currently being served by CLECs. CEAs are defined by natural geographic aggregations of economic activity and cover the entire state of South Carolina. BellSouth recommends the Commission adopt its definition of geographic markets and reject MCI's proposed definition of geographic markets.

SWITCHING TRIGGERS

Q. IN DISCUSSING WHAT CRITERIA HE RECOMMENDS THE COMMISSION APPLY WHEN IDENTIFYING SELF-PROVISIONING TRIGGER CANDIDATES, MR. GILLAN STATES THAT THE COMMISSION

SHOULD EXCLUDE CANDIDATES THAT DO NOT RELY ON ILEC ANALOG LOOPS (PAGES 37 & 48-51). PLEASE ADDRESS THIS COMMENT.

A. Mr. Gillan states that "Self-Providers Must Be Relying on ILEC Loops or Offer Service of Comparable Cost, Quality and Maturity" (page 48) in order for them to be included as candidates that meet the self-provisioning trigger. This is clearly inconsistent with the *TRO* – as footnote 1560 explains:

> We recognize that when one or more of the three competitive providers is also self-deploying its own local loops, this evidence may bear less heavily on the ability to use a self-deployed switch as a means of accessing the incumbent's loops. Nevertheless, the presence of three competitors in a market using self-provisioned switching and loops, shows the feasibility of an entrant serving the mass market with its own facilities.

Although Mr. Gillan would have this Commission exclude carriers that do not rely upon BellSouth's local loop facilities to provide service to their customers, the *TRO* clearly states otherwise. Accordingly, the Commission can, and should consider a carrier that provides its own switching as a trigger candidate, even if the carrier self-provisions its own loops as well.

Q. MR. GILLAN RECOMMENDS THAT A "*DE MINIMUS*" [SIC] CRITERION BE ADDED BY THE STATE COMMISSIONS TO THE TRIGGERS TEST (PAGES 52-54). IS THIS RECOMMENDATION CONSISTENT WITH THE

REQUIREMENTS OF THE *TRO*?

A. No. The *TRO* does not establish any size requirements or specific quantitative standard regarding the number of customers in a market that must be served before a self-provisioning carrier can be "counted" for purposes of the triggers test. Any imposition of a *de minimis* requirement regarding the number of customers served would be completely outside the explicit dictates of the *TRO*.

Q. WHY DO THE PARAGRAPHS CITED BY MR. GILLAN NOT SUPPORT A REQUIREMENT THAT A TRIGGER CANDIDATE PASS A *DE MINIMIS* TEST?

A. The only support that Mr. Gillan provides for his assertion that there should be a quantitative analysis is language in a section of the *TRO* (¶ 438) that appears well before the section that establishes the triggers test (¶¶ 498 – 505). Paragraph 438 of the *TRO* addresses the finding of *national* impairment and merely indicates that the FCC found *in aggregate* that the evidence in the record regarding the *overall* level of switch deployment was insufficient to warrant a finding in the *TRO* that CLECs are not impaired on a national basis. By contrast, the triggers tests, which are described some forty pages later in the *TRO*, posit a set of bright-line rules that, if met, overcome this presumption of national impairment. The discussion in paragraph 438 of the *TRO* is neither a part of the triggers tests nor is it logically linked to the tests.

Q. ARE THERE REASONS TO BELIEVE THAT THE FCC INTENDED TO ESTABLISH A *DE MINIMIS* STANDARD AS A PART OF ITS TRIGGERS TESTS?

A. No. At one point in his testimony, Mr. Gillan argues that the *TRO* requires state commissions to apply "judgment, experience, and knowledge of local competitive conditions" to implement the triggers test, but he is simply grasping at straws. (Gillan, p. 55) In fact, the *TRO* is clear that it wishes to *remove* as many subjective elements as possible from the triggers test, and that is why the test is defined so objectively. (*TRO* ¶ 428, ¶ 498) The FCC was clear to spell out a number of criteria that it *did* intend for the state commissions to apply (e.g., the number of carriers required to demonstrate "multiple, competitive supply", *TRO* ¶ 501). If the FCC had intended state commissions to assess the "size" of carriers or their operations, it surely would have explicitly said so – just as it has done in countless other instances where it has established such bright line tests. Indeed, after describing in paragraph 499 the factors that are to be considered by the state commissions, the *TRO* explicitly indicates that "[f]or purposes of these triggers, we find that states shall not evaluate any *other* factors…" (*TRO* ¶500, emphasis added)

Q. ARE THERE ADDITIONAL REASONS THAT MR. GILLAN'S PROPOSED *DE MINIMIS* SIZE REQUIREMENT IS INCONSISTENT WITH THE FCC'S TRIGGERS TEST?

A. Yes. Apart from the FCC's desire for administrative simplicity and to avoid interpretive ambiguity, the triggers test is designed to reflect the presence of facilities-based competition. However, as Chairman Powell notes in his separate statement, there is significant evidence that the availability of TELRIC-priced, wholesale switching deters facilities-based competitors. (Separate Statement of Chairman Michael Powell at p. 6). Consequently, creating a minimum penetration standard would virtually ensure that the non-impairment tests would never be met, because the availability of UNE-P would itself deter the level of penetration required for a finding of non-impairment. This may explain why Mr. Gillan proposes the addition of a *de minimis* size requirement in the first place.

Q. DOES DR. BRYANT PROPOSE A "*DE MINIMIS*" TEST?

A. Yes. In response to BellSouth's Florida interrogatory 3-119 (Docket 030851-TP) on this topic, Dr. Bryant admits that he proposes such a test and cites to paragraph 499 of the *TRO*. In that response, Dr. Bryant specifically points to the FCC's statement that ". . . the identified competitive switch providers should be actively providing voice service to mass market customers in the market" as implying "that some determination be made regarding the number of customers being served."

Q. PLEASE COMMENT ON DR. BRYANT'S INTERPRETATION OF THE *TRO*.

A. Dr. Bryant's proposal simply is not supported by the FCC's statement. There is no mention in that statement of customer counts, hurdles, market shares or any

other quantitative indicator of "active" provision of service. The FCC is perfectly capable of imposing such quantitative requirements, but it did not. Indeed, a further reading of that general section of the *TRO* shows that the FCC proposes a *qualitative* indicator of "active" provision of service rather than the quantitative approach advocated by Dr. Bryant. In footnote 1556, the FCC notes that "actively providing" can be determined by reviewing whether the competitive switching provider has filed a notice to terminate service in the market. Such an investigation should satisfy the Commission that there is "active" provisioning of service, since in paragraph 500 of the *TRO*, the FCC obliges states *not* to evaluate any other factors regarding CLEC provisioning because, as the FCC notes, even carriers in Chapter 11 bankruptcy protection "are often still providing service." The FCC's proscriptions would rule out open-ended requirements such as Dr. Bryant's proposal. Dr. Bryant's attempt to bootstrap an additional rule is undermined, not supported, by the section of the *TRO* that he identifies, and CLEC proposals to impose a *de minimis* requirement should be rejected as being inconsistent with the FCC's desire for a bright-line test that is designed to reduce administrative delay.

Q. SHOULD THIS COMMISSION CONSIDER ANY OF THESE ARGUMENTS?

A. No. These arguments do not represent genuine proposals. Rather, they are assertions of vague and unspecified steps that would compromise the bright-line test that the FCC requires. In creating the triggers tests, the FCC concluded that the thresholds that it created are "based on our agency expertise, our interpretation of the record, and our desire to provide bright-line rules to guide the

state commission in implementing section 251." (*TRO* ¶ 498) The FCC declined to create ambiguous thresholds that would result in implementation issues and administrative delay.

Q. MR. GILLAN CONTENDS THAT, IN CONDUCTING A TRIGGERS ANALYSIS, THERE IS A DIFFERENCE BETWEEN AN "ENTERPRISE SWITCH" AND A "MASS MARKET SWITCH". (GILLAN DIRECT PP. 38-40) HOW DO YOU RESPOND?

A. This contention is simply a distraction that the Commission should reject. The actual rules refer only to "local switches" (for the self-provisioning trigger) and "switches" (for the wholesale trigger). There is no distinction between a so-called "enterprise" and "mass market" switch, despite Mr. Gillan's suggestions to the contrary.

The text of the *TRO* is consistent with the rules – in the triggers analysis portion of the text, the FCC does not make any distinction between or require that a particular switch be dedicated solely to providing enterprise or mass market switching. Contrary to these witnesses' contentions, the language of the *TRO* clearly contemplates that carriers will use a single switch or switches to serve *both* enterprise *markets* and mass *markets.* This language is reflected in the paragraphs Mr. Gillan relies upon in his testimony; specifically, at ¶ 441 the FCC states:

> For example, in order to enable a switch serving large enterprise customers to serve mass market customers, competitive LECs *may* need to purchase additional analog equipment, acquire additional collocation space, and purchase additional cabling and power. (Emphasis added).

Likewise, at ¶ 508:

> We determine that to the extent that there are two wholesale providers or three self-provisioners of switching serving the voice *enterprise* market, and the state commission determines that these providers are operationally and economically capable of serving the *mass* market, this evidence must be given substantial weight by the state commissions in evaluating impairment in the mass market. We find that the existence of serving customers in the *enterprise* market to be a significant indicator of the possibility of serving the mass market because of the demonstrated scale and scope economies of serving numerous customers in a wire center using a single switch. (Emphasis in original)

Clearly, the FCC expects carriers to use a single switch to serve customers in both the enterprise and mass markets. While the FCC has precluded the use of switches that serve *only* the enterprise market from qualifying for the triggers analysis, it is ludicrous to exclude as a triggers candidate a carrier's switch that serves *both* markets, which is the ultimate outcome of a competitive market. It

would be equally absurd to engage in some type of capacity counting exercise and try to allocate switch capacity between various markets. The rules require only that the switches used to meet the triggers analysis are serving either mass market customers or DS0 capacity loops and any attempt to create additional requirements where none exist should be rejected by this Commission.

BELLSOUTH'S BATCH HOT CUT PROCESS

Q. THE CLECS CITE TO THE FCC'S PROVISIONAL FINDING ON THE HOT CUT PROCESS AS EVIDENCE THAT BELLSOUTH'S HOT CUT PROCESS IS FLAWED. IS THIS VALID?

A. No. The FCC made a provisional national finding regarding hot cuts, but, at the same time, requested the state commissions to examine the issue more closely. The FCC held that the state commissions must adopt and implement a batch hot cut process within 9 months of the effective date of the Order. *See* ¶423 ("specifically, we ask the state commissions, within nine months of the effective date of this Order, to approve and implement a batch cut migration process – a seamless, low-cost process for transferring large volumes of mass market customers – or to issue detailed findings that a batch cut process is unnecessary in a particular market because incumbent LEC hot cut processes do not give rise to impairment in that market"); 47 C.F.R. 51.319(d)(2)(ii) ("the state commission

shall…establish an incumbent LEC batch cut process…"). Thus, at the conclusion of this proceeding, this Commission must order a batch hot cut process.

Moreover, the FCC's reasoning on hot cuts in the *TRO* is flawed. The FCC ignored specific data, the same data upon which it relied in its 271 decisions, in favor of vague, unreliable and out-of-date information. For example, the *TRO* credited an AT&T assertion that, several years ago, it lost customers in several states, including Texas and New York, because of hot cut difficulties. Conversely, the FCC rejected nearly identical claims made by AT&T when it granted long-distance authority to Verizon and SBC in each of these states. Since that time, the FCC has considered hot cut issues in all other 271 proceedings and has reached the same conclusion - that RBOCs are meeting their 271 obligations. Thus, the FCC has granted their applications. However, the FCC's analysis of the hot cut issue on a national basis in the *TRO*, while inadequate for what it was, says nothing about BellSouth's hot cut process, despite CLEC claims to the contrary.

Q. AT&T WITNESS VAN DE WATER, AT PAGE 59-60, AND MCI WITNESS LICHTENBERG, AT PAGES 19-21, SUGGEST THAT THE HOT CUT PROCESS SHOULD MIRROR THE SEAMLESS NATURE OF UNE-P MIGRATIONS AND PIC CHANGES. DO YOU AGREE?

A. Absolutely not. To implement the scenario the CLECs advocate would require substantial investment on BellSouth's part to upgrade its existing network

because neither BellSouth nor any other RBOC can accomplish electronic loop provisioning ("ELP") today with existing network architectures. Rather than discussing the hot cut process applicable to the network that exists today, the CLECs talk about a process that might only be possible in an entirely new network at some point in the future. BellSouth witness Gary Tennyson discusses this issue in greater detail in his rebuttal testimony.

Moreover, the CLECs' argument that they are impaired without unbundled switching until such time as the UNE-L is equal to the UNE-P is based on the wrong test. The question for the Commission is not whether UNE-P is the same as UNE-L, but rather whether an efficient CLEC can economically enter the market without access to unbundled switching. Because the answer to that question is unequivocally "yes," it is understandable that those CLECs relying upon UNE-P seek to change the question.

Q. MS. LICHTENBERG ALLEGES (PAGE 15) THAT THE FCC "RECOGNIZED" THAT HOT CUTS MUST BE "AS SEAMLESS AND TROUBLE FREE AS THEY ARE WITH LONG-DISTANCE AND UNE-P." IS SHE RIGHT?

A. No. In fact, the FCC found exactly the opposite when it flatly rejected AT&T's ELP proposal. The FCC declared that to make the necessary system changes called for by AT&T's ELP proposal "would require significant and costly upgrades to the existing local network at both the remote terminal and central office. AT&T's ELP proposal proposes to 'packetize' the entire public switched

telephone network for both voice and data traffic, at a cost one party estimates to be more than $100 billion. Incumbent LECs state that AT&T's proposal would entail a fundamental change in the manner in which local switches are provided and would require dramatic and extensive alterations to the overall architecture of every incumbent LEC local telephone network. Given our conclusion above, we decline to require ELP at this time…" (*TRO* ¶ 491) This Commission should give ELP no more consideration than did the FCC.

Q. MR. VAN DE WATER CONTENDS (AT PAGES 19-20) THAT THE RATE FOR HOT CUTS SHOULD BE BASED ON ELECTRONIC LOOP PROVISIONING. DO YOU AGREE?

A. No, I do not agree, and neither did the FCC. As stated above, the FCC flatly rejected AT&T's ELP proposal. The FCC directed state commissions to approve a batch cut process which it expects will be lower in cost than single hot cut rates. BellSouth has developed such an offering. Mr. Van de Water compares the rate BellSouth charges for PIC changes and UNE-P changes to the rate for hot cuts. As noted above, such a comparison is inappropriate. The cost incurred for PIC changes and UNE-P migrations are different than the cost incurred to perform a hot cut of a UNE-L because the UNE-L hot cut requires physical work. The Commission already has considered these facts and established TELRIC hot cut rates.

Q. MR. WEBBER STATES (PAGE 20) THAT ONE OF THE REASONS ILECS ARGUE AGAINST THE IMPLEMENTATION OF AN AUTOMATED

MIGRATION SYSTEM IS TO PRECLUDE THE GROWTH OF UNE-L. DO YOU AGREE WITH HIS ASSESSMENT?

A. No, I do not agree. The creation of an automated UNE-L migration system would be cost prohibitive for all carriers involved in interconnecting to the network. Such a change would be a fundamental change in how the telephone network processes information. The FCC recognized this when they rejected AT&T's ELP proposal. As BellSouth witness Gary Tennyson describes, moving to an automated system, one that is not in place today, would cost billions of dollars to develop and would require deployment of equipment that in many cases does not even exist at commercially viable levels.

Q. ON PAGES 39-40, MR. TURNER ALLEGES THAT BELLSOUTH'S SOUTH CAROLINA HOT CUT CHARGES CONSTITUTE AN ECONOMIC IMPAIRMENT TO UNE-L. HOW DO YOU RESPOND?

A. The charges about which Mr. Turner complains were previously approved by this Commission.[5] This Commission approved the non-recurring rates for the elements necessary for hot cuts in its UNE Cost Docket (Docket No. 2001-65-C). When the Commission released its order approving BellSouth's UNE rates, AT&T had the opportunity to raise its concern that such non-recurring rates constituted an economic impairment. It, however, did not do so. Raising cost issues in this proceeding rather than in Docket 2001-65-C should be seen for what

[5] The elements included in a hot cut are the type of loop (i.e., SL1, SL2, UCLND), order coordination (optional), electronic service order, and cross connects.

it is – a ploy to perpetuate UNE-P rather than a serious complaint about the Commission's rates for hot cuts.

OTHER ISSUES

Q. MR. WEBBER, ON PAGES 51-53 OF HIS TESTIMONY, TRIES TO LINK THIS COMMISSION'S DECISION ON SWITCHING WITH THIS COMMISSION'S DECISION ON TRANSPORT. IS THAT APPROPRIATE?

A. Absolutely not. This Commission has established a separate proceeding (Docket No. 2003-327-C) to determine impairment issues relating to UNE Transport. Any issues that Mr. Webber wants to raise relating to UNE Transport should be addressed in that proceeding, not this one.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

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